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Power of the Surrogate to Vacate Order of Adoption

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Since the New York courts do not "strain for probate"¹⁸ the new rule will prove a welcome aid in expediting will contests here. The old formula has been severely criticized as having no basis in logic.¹⁹ A testator who is insane or unduly influenced is necessarily unaware of either disability. It is imposing a great strain upon the language to say that he "communicates" the "fact" of such incompetency to his attorney, since he neither knows of its existence nor communicates it in confidence. Nor can it seriously be argued that the testator intends that facts which will clarify the meaning of his will should be kept secret. His very purpose in seeking the services of a lawyer is that his will be so drawn that his wishes cannot be disputed after his death. The conclusion is inescapable, also, that knowing that probate is impossible without due execution, he cannot wish the facts surrounding this act to remain undisclosed.²⁰ It appears not quite reasonable that his attorney's testimony should ever have been excluded.

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POWER OF THE SURROGATE TO VACATE ORDER OF ADOPTION.—The legislature has belatedly recognized the inconvenience attending the restraint, by judicial rulings, placed upon the surrogate's powers denying him authority to vacate an order of adoption issued out of his court. An amendment to Section 113 of the Domestic Relations Law now specifically provides that "The Surrogate may open, vacate or set aside, an order of adoption for fraud, newly discovered evidence, or other sufficient cause, in like manner, as a court of record and of general jurisdiction exercises the same powers."¹ This legislation was found necessary in spite of the broad powers given the surrogate by subdivision 6 of Section 20, of the Surrogate's Court Act,² which permits him to "open, vacate, modify or set aside, or to enter as of a former time, a decree or order of his court." The former rule, forbidding the vacating of an order of adoption, or the setting aside of a consent to an abrogation of adoption, resulted from the Appellate Division's view that an adoption proceeding was administrative rather than judicial. "In both cases he (the surrogate), representing the public interests in domestic relations, is approving a contract, and his approval gives it the prescribed statutory effect, in the one

¹⁸ Taft, *Comments on Will Contests in New York* (1921) 30 YALE L. J. 593, 606.

¹⁹ Cf. 4 WIGMORE, EVIDENCE (2d ed. 1923) §2314.

²⁰ *Ibid.*

¹ Laws of 1934, c. 368, N. Y. DOMESTIC RELATIONS LAW, art. 7, §113, effective Sept. 1, 1934.

² Laws of 1920, c. 928, derived from §2481, N. Y. CODE OF CIVIL PROCEDURE.

case creating the legal status of parent and child, and in the other terminating it. The fact that in one case his approval is called an order, and in the other a consent does not alter the nature and quality of the act."³

This position gains further support from the nature of the contract of adoption. The status was unknown to the common law, and is entirely a creature of statute.⁴ Although an adoption is often called a contract, unlike other contracts, it requires the approval of a surrogate as well as strict compliance with the statutory requirements.⁵ Between the parties there is no issue either of law or fact. The surrogate does not inquire into the validity of the contract; the statute requiring merely that his decision be dictated by the moral and temporal interests of the adopted person. There are no parties in the sense in which the term is used in other proceedings and actions. There is no wrong to be remedied, and the rights and duties of the persons before him are not determined by the surrogate, but by the statute.

Under the Code of Civil Procedure the courts held that the powers of the surrogate were strictly statutory.⁶ In consequence it was necessary to invoke the aid of the Supreme Court with its ample equity jurisdiction to annul an adoption secured by fraud or which violated other equitable principles. But the amendment of 1921 giving the Surrogate's Court general equitable jurisdiction in addition to the previous grants of specific jurisdiction in equity, may reasonably be supposed to have removed that court's limitation in respect to adoptions.⁷ In the *Matter of Ziegler*,⁸ which affirmed the surrogate's refusal to vacate his consent to an abrogation of adoption, the court appears to have based its decision on the very limitations which the legislature attempted to remove in 1921. Mr. Justice Scott, writing for the court, said, "We maintain some doubt, however, whether the Surrogate had jurisdiction to maintain the proceeding and to grant the relief desired. That court is one of strictly limited statutory jurisdiction and has no general equity powers."⁹ Whether the court acquired the power by virtue of the 1921 amendment is now an academic question. The amendment to the Domestic Relations Law has removed all doubt.

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³ *Stevens v. Halstead*, 181 App. Div. 198, 168 N. Y. Supp. 142 (2d Dept. 1917).

⁴ SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) §719; see *Matter of Ziegler*, 82 Misc. 346, 143 N. Y. Supp. 562 (1913).

⁵ *In re Thorne*, 155 N. Y. 140, 49 N. E. 661 (1898).

⁶ *Matter of McDevitt*, 176 App. Div. 418, 162 N. Y. Supp. 1032 (2d Dept. 1917); *Stevens v. Halstead*, *supra* note 3.

⁷ *Matter of Van Buren v. Estate of Decker*, 204 App. Div. 138, 198 N. Y. Supp. 297 (3d Dept. 1923).

⁸ *Matter of Ziegler*, *supra* note 4, *aff'd*, 161 App. Div. 589, 146 N. Y. Supp. 881 (1st Dept. 1914).

⁹ *Matter of Ziegler*, 161 App. Div. at 590, 146 N. Y. Supp. at 882 (1st Dept. 1914).